United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

351

SUPPLEMENTAL REPLY BRIEF FOR APPELLANTS

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,756

TYRONE R. YOUNG, APPELLANT
v.
UNITED STATES OF AMERICA, APPELLEE

No. 21,757

GUY D. HARRIS, APPELLANT
v.
UNITED STATES OF AMERICA, APPELLEE

No. 21,857

ROY L. JOHNSON, APPELLANT
v.
UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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April 10, 1969

STATEMENT

At the oral argument on April 2, 1969 the Court granted appellants leave to file a supplemental brief after oral argument in view of the fact that the Supreme Court had, the day before, handed down its decision in Foster v. California, dealing with the question of lineups which violate due process.

ARGUMENT

In Foster v. California, 37 U.S.L. Week 4281 (U.S. April 1, 1969) the Supreme Court remanded the case because the lineups which were conducted and which resulted in an eyewitness identification of petitioner were violative of due process.

Originally, Foster was placed in a three man lineup in which he was substantially taller than either of the other two men, by approximately five or six inches. Also, Foster was wearing a leather jacket which was similar to that worn by the robber being sought. Later Foster had a one-to-one confrontation with the eyewitness and this was followed a week to ten days later by a five man lineup in which Foster was the only person who was present in the earlier three man lineup. The eyewitness was less than positive in his identification at the three man lineup and in one-to-one confrontation, although by the time he viewed the five man lineup he was "convinced" Foster was the man.

The Court in remanding the case stated that:

> "Judged by that standard [i. e., the Stovall standard], this case presents a compelling example of unfair lineup procedures. [footnote] In the first lineup arranged by the police, petitioner stood out from the other two men by the contrast of his height and by the fact that he was wearing a leather jacket similar to that worn by the robber. See United States v. Wade, supra, at 233."

Appellants urge that they were denied due process because of the unfairly constituted lineup in which Mr. Matthews identified them. The lineup was unnecessarily suggestive because of (1) the heights of the plainclothes policemen in the lineup; (2) the distinctive dress of the policemen; (3) the fact that Bell (the fourth suspect) was taller and darker than appellants; (4) the fact that appellant Harris was told to wear a suggestive coat belonging to Bell; (5) the fact that the lineup included four suspects and only two non-suspects; and finally (6) because the shotgun found in appellants' car was in plain view during the lineup.

The facts in the Foster case are strikingly similar to those in the instant appeal. As the photograph of the lineup shows (defendant Young's Exhibit No. 1), the three appellants in this case were the three shortest persons in the lineup.[1/] Harris in the number 2 position represents the greatest disparity in heights and is probably close to six inches shorter than either of the two police officers who were in the lineup.[2/]

1/ As the record shows, appellants Harris, Young, and Johnson are respectively in the number 2, number 3 and number 5 positions counting from left to right. The fourth suspect, Lawrence Bell, is in the number 6 position. The two police officers who were placed in the lineup are in positions number 1 and 4.

2/ While Harris testified that he is 5'6" tall (T. Tr. 415), the heights of the other appellants and the two police officers are not in the record. Therefore, comparison of the actual heights is not possible with the present record.

As the photograph clearly indicates, appellants were subjected to an unfair lineup by reason of the fact that the police officers, who were present in the lineup, stood out because of their height, the disparity being the greatest with appellant Harris, but the unfairness being present to a very substantial degree with appellants Young and Johnson. Bell, the fourth suspect, was considerably taller and darker than any of the three appellants and was thereby eliminated. The distinctive dress of the police officers, namely coats and ties, of course, further distinguished them from the appellants.

An additional element of unfairness relating to Harris, as discussed in the Brief for Appellants pages 54-55, is that Harris was told by the police to wear a coat belonging to the fourth suspect, Bell, in the lineup. The coat was much too large for Harris. Since the wielder of the shotgun had also worn an oversized, unusually long, dark topcoat, the suggestiveness of Harris's attire was clear. In Foster, the Supreme Court considered the fact that petitioner was wearing a leather jacket similar to that worn by the robber constituted an element of unfairness. Here, where Harris was told to wear the coat of another, the unfairness becomes more glaring.

In appellants' lineup there were only two non-suspects, and a total of four persons who were suspected of a crime. The probability of a mistaken identification is greatly increased under such conditions. With a

sawed off shotgun in plain view during the lineup, Mr. Matthews was predisposed to pick out the three men in the lineup who most resembled his assailants. This he did, but only under such unnecessarily suggestive conditions as to render the lineup violative of due process of law. The admission of this evidence at the trial constituted error necessitating a new trial.

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing brief has been personally served at the office of the United States Attorney, United States District Courthouse, Washington, D. C. this 18th day of April, 1969.

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REPLY BRIEF FOR APPELLANTS

UNITED STATES COURT OF APPEALS
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February 17, 1969

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ARGUMENT I

APPELLANTS CONSTITUTIONAL RIGHTS UNDER THE FOURTH AMENDMENT WERE VIOLATED AND EVIDENCE OBTAINED AS A RESULT THEREOF SHOULD HAVE BEEN SUPPRESSED

The Government in its brief has relied heavily on Terry v. Ohio [1] in order to justify the forcible stop of appellants' automobile. In order to bring the instant case within the realm of the very limited holding in that case, the Government has grossly exaggerated the "suspicious" activity which allegedly gave rise to a "challenging situation". [2] Appellants concede that Officers Kerick and Rattay were members of the Special Operations Division (Item 1 in the Government's brief, p. 27). The Government next attempts to make it appear that appellants were "casing a job", as in Terry, [3] by distorting the testimony. The Government states that appellants "were intensely scanning the bank premises." (Item 2 in the Government's brief, p. 27). The only support cited for the statement is Officer Kerick's testimony that the occupants of the car "were intent on looking into the bank." [4] The difference between "scanning" the "premises" and merely

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1 / 392 U.S. 1 (1968). Contrary to the Government's statement that appellants "chose completely to ignore" the Terry case (Appellee Br. 32), appellants also rely on Terry (Appellants' Br. 35-36).

2 / Appellee Br. 27.

3 / In Terry, the suspects would sequentially walk past a store window, pausing to look in, continue on, and then return, pausing again to look into the store. Then the second man would do the same. "The two men repeated this ritual alternately between five and six times apiece - in all, roughly a dozen trips." (20 L. ed at 897). A third cohort was also acting suspiciously.

4 / Motion 27.

looking into the bank is apparent. The latter could be occasioned by anyone waiting for a friend returning from the bank and is an everyday occurrence. The former implies a perusal of the entire property which is more difficult to characterize as a common occurrence.

As to item 3, concerning the speed at which appellants departed from the bank, for some reason the Government felt it necessary to change Officer Kerick's testimony that it was "unreasonable for their condition"[5/] into an "unusually high rate of speed". Again, the Government, not satisfied with the testimony as given, appears to be grasping for that slight shade of difference which turns normal actions into "suspicious" ones.

The distortion of the testimony in item 4 concerning appellants' subsequent route, could hardly be called a slight shade of difference. The Government asserts that appellants "made several U-turns into alleys to lose the officers,"; whereas the testimony of Officer Kerick cited in support of this statement was that appellants "made a few turns in the alley to lose us." Again, the latter is quite normal, while the former might be considered unusual.

As a last element of appellants' alleged suspicious activity, the Government states that the D.C. Butter and Egg truck was "overdue", and ipso facto it is supposed that appellants must have held it up. What the Government does not state is that the D. C. Butter and Egg truck in driving away from the bank had already passed the street at which it would have turned to go to its office in the twelve hundred block of

5/ Motion 44

Fifth Street, N.E. Therefore, Officers Kerick and Rattay knew that the driver of the truck was not even attempting to go directly to its office, and that this would explain its being "overdue".[6] Certainly in light of what was known to Officers Kerick and Rattay, the fact that someone at the office considered the truck to be "overdue" was not suspicious activity which can be attributed to appellants.

Thus, it is urged, the appellants fall far short of that level of suspicious activity found in Terry which there justified the seizure. Also, in Terry the seizure, which the Court expressly held to be within the province of the Fourth Amendment,[7] was by one police officer who merely approached the three suspects on the street. Here, where, after a forcible stop, either five or seven police officers surrounded appellants' car prior to a legal arrest, the magnitude of the seizure becomes apparent. It was based on considerably less suspicion than existed in Terry, and it involved a great deal more restraint.

As stated by Justice Harlan in his concurring Opinion in Sibron v. New York,[8]

> "The forcible encounter between Officer Martin and Sibron did not meet the Terry reasonableness standard. In the first place, although association with known criminals may, I think, properly be a factor contributing to the suspiciousness of circumstances, it does not, entirely by itself, create suspicion adequate to support a stop. There must be something at least in the activities

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6/ Tr. 209-11.
7/ 20 L. ed at 903.
8/ 392 U.S. 40, 20 L. ed. 2d 917, 940-41 (1968)

> of the person being observed or in his surroundings that affirmatively suggests particular criminal activity, completed, current, or intended."
> (Emphasis added)

It is strongly urged that the Government has not met the test necessary to justify an infringement of appellants' Fourth Amendment rights.

ARGUMENT II

APPELLANTS WERE SUBJECTED TO AN UNNECESSARY DELAY BEFORE ARRAIGNMENT IN VIOLATION OF RULE 5(a) FED. R. CRIM. P. AND EVIDENCE OBTAINED DURING THE DELAY SHOULD HAVE BEEN SUPPRESSED

This Court has decided in Williams and Coleman v. United States,[9] that lineups are subject to the Mallory rule.[10] This rule applies to cases arising prior to United States v. Wade, 388 U. S. 218 (1967) and Gilbert v. California 388 U. S. 263 (1967).[11]

The Court stated:

> "In the present case, Williams was arrested at 10:00 P.M. on June 21, 1965. The following morning, around 9:30, he was placed in the line-up at which Mrs. Neal identified him. Immediately following the lineup, and some 12 hours after his arrest, he was presented to a magistrate. At the trial Mrs. Neal identified Williams in court, and testified on direct examination to having

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9/ D.C. Cir. Nos. 21,269 and 21,270, decided December 20, 1968 (petition for rehearing en banc pending).
10/ 354 U. S. 449 (1957)
11/ Coleman and Williams, supra, slip op. at p. 8, n. 6.

> identified him at the lineup. There were no exigent circumstances which required that Williams be immediately shown to witnesses prior to presenting him. Compare Stovall v. Denno, supra. Nor does any other reason appear why he should have been detained and subjected to a lineup before his right to counsel was implemented by the United States Commissioner as required by law. 18 U.S.C. §3006A(b) (1964); 2 D.C. Code §2202 (1967). Therefore, it was error to allow Mrs. Neal's testimony about the lineup."

In the instant case appellants were subjected to numerous lineups, variously estimated to be between three and six.[12/] These lineups utilized time which could have been applied to the booking process.[13/] As a direct result of the lineups, the booking process was delayed.[14/] This in turn directly resulted in approximately a 21 hour delay between arrest and arraignment. But for the lineups, appellants probably could have been arraigned when Detective Blancato talked to the Commissioner at 3:00 P.M. when the Commissioner was still available.[15/] Instead, appellants were without the benefits of an arraignment until the next day. This delay was clearly unnecessary.

12/ Motion 257, Tr. 402.
13/ It appears the lineups ended around 3:00 P.M. or over two hours after appellants were arrested (Motion 123).
14/ In fact, when the numerous lineups finished appellant Harris (for one) had not yet been asked for his personal effects. Furthermore, the search of Harris's unclad body had been postponed until after the lineups (Tr. 402-04). Clearly, these portions of the booking process were delayed because of the lineups, thereby resulting in an unnecessary delay in arraignment. It also should be apparent that appellants' trip to the Identification Bureau at Police Headquarters, subsequent to the lineups, for photographing, fingerprinting, etc., was delayed because of the lineups (Motion 178-79).
15/ Motion 188-90.

in violation of Rule 5(a), and was caused by an attempt to link appellants to crimes other than the ones for which they were arrested. One such lineup resulted in identifications by Mr. Matthews relating to the instant appeal. There were no exigent circumstances requiring immediate lineups.

In accordance with this Court's decision in Williams and Coleman v. United States, supra, this case at a minimum should be remanded to the trial court for the determinations of taint and harmless error of Mr. Matthews' in court identifications of appellants. Mr. Matthews' testimony at the trial concerning his previous identifications at the lineup should definitely have been excluded, unless it is determined that this was harmless error.

CONCLUSION

Appellants pray that this Court reverse their convictions and remand with instructions to dismiss the indictments, or in the alternative to reverse and remand for a new trial and appropriate hearings.

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Reply Brief has been personally served at the Office of the United States Attorney, United States District Courthouse, Washington, D. C., this 17th day of February, 1969.

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BRIEF FOR APPELLANTS

UNITED STATES COURT OF APPEALS
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November 15, 1968

QUESTIONS PRESENTED

I

Whether appellants were denied their Fourth Amendment rights under the Constitution by the denial of their motions to suppress evidence found as a result of a search of the car in which they were riding.

a. Whether appellants were arrested without probable cause at the time the car in which they were riding was stopped by the police.

b. Whether the appellants were subjected to an unreasonable search and/or seizure by the stopping and searching of the car in which appellants were riding.

c. Whether appellants were subjected to an illegal search of the car in which they were riding where the police did not have a search warrant, nor the consent of appellants, had not made a legal arrest, and did not have probable cause to do so.

II

Whether appellants were denied due process of law under the Fifth Amendment by the denial of their motions to suppress evidence relating to identification of appellants at a line-up which was unnecessarily suggestive and conducive to mistaken identification.

III

Whether the trial judge erred by denying appellants' motions to suppress testimony relating to the line-ups where the line-up identifications were obtained during an unnecessary delay before presentment of appellants to a Commissioner in violation of Rule 5a, Federal Rules of Criminal Procedure.

IV

Whether the trial judge erred in admitting the in-court identifications of appellants, the identifications being the fruit of an illegal search and seizure and an illegal line-up.

This case has never been before this Court.

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JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the United States District Court for the District of Columbia (entered February 23, 1968, as to appellants Harris and Young and entered March 20, 1968, as to appellant Johnson) convicting appellants of robbery in violation of Title 22, Section 2901, and assault with a dangerous weapon in violation of Title 22, Section 502, both of the District of Columbia Code. Additionally, appellant Young was convicted or carrying a dangerous weapon in violation of Title 22, Section 3204 of the District of Columbia Code.

Notice of Appeal was filed on behalf of appellant Harris on February 26, 1968; on behalf of appellant Young on February 23, 1968; and on behalf of appellant Johnson on March 21, 1968, all pursuant to Rule 37 of the Federal Rules of Criminal Procedure.

Jurisdiction of this Court is founded upon Title 28, United States Code, Section 1291.

STATEMENT OF THE CASE

The appellants were charged in a ten count indictment (G.J. No. 447-67) with assault with a dangerous weapon against Curtis G. Matthews, Price G. Edwards, and William D. Matthews, Jr., (Counts 2, 3, 5, 6, 7 and 8); robbery of Curtis G. Matthews (Count 1); and robbery of Price G. Edwards (Count 4). Additionally, appellant Harris was charged with illegal possession of a firearm (Count 9), and appellant Young was charged with carrying a dangerous weapon without a license (Count 10). The ninth count was dismissed as a result of a motion by appellant Young (Motion 3-7).[1/] The motion was not opposed by the Government (Motion 305). Counts 7 and 8 relating to the assaults with dangerous weapons upon William D. Matthews, Jr. were dropped by the Government (Tr. 615).

On February 27, 1967 shortly after 11:00 A.M., the complaining witness, Mr. Curtis G. Matthews was in his drugstore located at 2202 Georgia Avenue, N.W. conducting business. At the same time, another complaining witness, Mr. Price G. Edwards who is employed by Lance, Inc., was in the drugstore replenishing the store's stock of Lance

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1/ One Motion to Suppress was heard on November 9, 1967 on behalf of Johnson. Another Motion to Suppress on behalf of all three appellants was heard just prior to trial on January 30-31, 1968. Hereafter, this latter motion will be referred to simply as "Motion" and the earlier motion will be referred to as the "Johnson Motion."

cookies, cheesecrackers, etc. Mr. Matthews turned around and saw a man standing next to one of the counters take a shotgun from underneath his coat. The man asked Mr. Matthews, "Where's the money?" After the man unsuccessfully tried to open the cash register, Mr. Matthews was ordered to and did open the register. Subsequently, Mr. Matthews was also ordered to open the safe which was located underneath the counter. Approximately $5.00 was taken from the register, but the man took no money from the safe. Upon further questioning by the man as to the whereabouts of the money, Mr. Matthews stated that the money was in his pocket, whereupon the man removed Mr. Matthews' wallet from his pocket and took $65.00 therefrom. During this time Mr. Matthews noticed two other men, one of whom was covering Mr. Edwards with a pistol, and the other of whom was standing by the front door (Tr. 53-56).

As the robbery was taking place, Mr. Matthews' nephew, William D. Matthews, Jr., entered the drugstore carrying a box. Both Mr. Matthews and his nephew were ordered to lie down on the floor (Tr. 56-57).

As Mr. Curtis G. Matthews was being robbed, Mr. Price Edwards had a gun placed at his neck by a second man. Mr. Price's billfold was removed from his pocket by the second man and about $140.00 to $150.00 was removed therefrom. Mr. Edwards was then ordered to lie down on the floor of the drugstore (Tr. 145-149).

After the three men had left the drugstore, Mr. Matthews went outside and flagged down a police scout car on Georgia Avenue. Description of the three men were given to Officer Scott who broadcast a lookout for the suspects (Tr. 57-58, 338-353).

At approximately 12:50 P.M. on the same day Officers Kerick and Rattay of the Special Operations Division of the Metropolitan Police Department arrested the three appellants in this case along with a fourth person (Lawrence Bell) as they were riding in a car in the vicinity of Third and K Streets, N.E. Washington (Tr. 179). Appellant Johnson was driving the car, and appellants Harris and Young were seated in the back seat of the car. The fourth person, Bell, was seated on the passenger side of the front seat (Tr. 181-183).

Officers Kerick and Rattay were dressed in ordinary civilian clothes and were using the private automobile of Officer Rattay (Tr. 178, 551). They became suspicious of the appellants because they had observed appellants sitting in an automobile parked across from the American Security and Trust Bank at Eighth and H Streets, N.E. at approximately 12:30 of the same day. The appellants appeared to be looking into the bank (Tr. 208-09). The driver of a D. C. Butter and Egg Co. truck left the bank, got into his truck, and drove west on H Street. Thereafter, appellants' automobile made a U-turn and appeared to follow the D. C. Butter and Egg Co. truck. Prior to this, appellants' car had been observed

by Officers Kerick and Rattay circling the block in front of the bank on one occasion (Tr. 557-59).

After the appellants' car made a U-turn to proceed west on H Street, Officers Kerick and Rattay made a similar U-turn and followed appellants' car west on H Street, the officers being approximately one and one-half blocks behind the car of the appellants (Tr. 559). After traveling a distance of approximately five blocks to Third Street and H Street, N. E., appellants made a righthand turn heading north on Third Street. At this point, Officers Kerick and Rattay lost track of the car in which the appellants were riding (Tr. 209).

Officers Kerick and Rattay then drove to the office of the D. C. Butter and Egg Co. which is located in the 1200 block of Fifth Street, N. E., to inquire about the truck. They learned that the truck was supposed to return from the bank, but had not yet arrived (Tr. 209-10).

In the meantime, Officers Kerick and Rattay had radioed to their senior officer, Sergeant Ellis, that they had appellants' car under observation, and that they would like assistance in stopping appellants' car. The object of the stop was to make a "suspicious spot check" of appellants' automobile (Motion 54). The stop was made because appellants had acted "suspicious", and not because they violated any traffic regulations (Motion 55, 80). Pursuant to the request of Officers Kerick and Rattay

for assistance, various cars under the control of Sergeant Ellis were converging on the area in order to aid in the stopping of appellants' car (Motion 76-77). At approximately 12:50 P. M. Officers Kerick and Rattay again spotted appellants' car heading north on Third Street in the vicinity of K Street, N. E. Appellants' car came to a stop at the intersection of Third and K Streets for a red light. At the same time, Sergeant Ellis' car arrived at the intersection of Third and K Streets and made a right-hand turn heading north on Third Street. As the light changed, appellants' car proceeded north on Third Street in the direction of Sergeant Ellis' car. Sergeant Ellis brought his car to an abrupt stop on Third Street facing north blocking the passage of appellants' car (Motion 73-74). Officers Kerick and Rattay immediately pulled up to within a few feet behind appellants' car, thus preventing appellants from either going forward or backward (Motion 32, 57). Within seconds, at least one other unmarked police car pulled up to the left of appellants' car thus blocking the only other lane of traffic and physically preventing appellants from moving their car in any direction. Shortly thereafter, still a fourth unmarked police car pulled up containing two more Special Operations Division officers dressed in civilian clothes (Motion 77-79, 95).

Sergeant Ellis got out of his car, a Volkswagon sedan, and walked back toward appellants' car. Within seconds the six police officers

occupying the other three unmarked cars also approached appellants' car (Motion, 77-78). Sergeant Ellis, being the only policeman in uniform, asked appellant Johnson, the driver, for his license and automobile registration. Appellant Johnson produced both documents to the satisfaction of Officer Ellis (Johnson Motion 10).

In the meantime, Officer Kerick had approached appellants' car from the rear on the right side and had begun making at least a visual search of the interior of the car. At some point in his search, Officer Kerick observed what appeared to be several inches of a shotgun barrel extending from underneath the driver's seat toward the rear of the car (Motion 34-35, 45-52, Tr. 184-87). At the Preliminary Hearing Officer Kerick appears to have testified that the car doors were open at the time he observed the shotgun, and that he had opened them (P. H. 17). At the trial Officer Kerick testified that the doors were not opened until after he had seen the shotgun (Tr. 186).

Appellant Harris testified that he was ordered out of the car at a time which was prior to anyone seeing the shotgun (Tr. 379-80). Appellant Johnson testified that the officers got into the car to search before finding the guns (Johnson Motion 10).

Once the shotgun was found all the occupants of the car were ordered out, and were officially notified that they were under arrest. A further search of the car revealed a .25 caliber automatic pistol under the right front seat (Tr. 191-93).

Up to this point, the police officers had not received a lookout for the car in which appellants were riding (Motion 26, 28-29); nor did the officers stop the appellants because they suspected appellants were in any way involved in the robbery which had taken place earlier at Mr. Matthews' Drugstore (Motion 58-59). The only reasons that Officers Kerick and Rattay decided to follow and stop the car in which appellants were riding was because they had seen appellants looking into the bank and because appellants had made a U-turn after the driver of the D. C. Butter and Egg Co. truck had pulled away from the bank (Motion 53). The arresting officers did not in any way connect the appellants with the robbery which had occurred earlier at Matthews' Drugstore until after the appellants were ordered out of the car and after the sawed off shotgun and pistol had been found in the car (Motion 58).

Prior to that time, appellants had committed no traffic violations known to the police officers, but had merely acted suspicious (Motion 80).

The appellants and the fourth occupant of the car were frisked and taken to the Ninth Precinct in a Patrol Wagon, accompanied by Officers Kerick and Rattay (Tr. 193-94).

Mr. Curtis Matthews and another individual, Robert M. Little, who had observed three persons running down Georgia Avenue shortly after the robbery, were brought to the Ninth Precinct around 2:00 P.M. to see if they could identify any of the appellants as the persons they had seen that day (Tr. 76-77, 460, 463). On the way to the lineup Mr. Matthews was told that the suspects he would view "had a shotgun" (Motion 201).

The appellants and the fourth occupant (Bell) of the car were placed in a lineup with two police officers. The officers were dressed in coat and tie, while the appellants and Bell were dressed in sport clothes. (See photograph marked "Defendant Young Exhibit No. 1 - Trial.") Appellant Harris was told to put on a coat which he testified belonged to Bell, for the purposes of taking photographs and lineups, and Bell was told to put on Harris' coat (Tr. 392-93, 401-02). The coat which Harris wore in the lineups was a long overcoat of a dark gray color which was too big for him and which fit the description of a coat worn by the man armed with a shotgun at the time of the robbery (Tr. 73, 99). Mr. Matthews testified that the shotgun was present and visible in the room during the lineup (Motion 202-03). Mr. Matthews identified the three appellants as being the three individuals involved in the robbery (Tr. 77). Mr. Little was able to identify only two of the appellants, Young and Harris (Tr. 469-70).

At approximately 3:00 P.M. Detective Blancato testified that he made a telephone call to determine if the Commissioner was available for arraigning the appellants. Detective Blancato told the Commissioner that they needed appellants for another 1-1/2 to 2 hours, and the Commissioner said to bring them in the next day (Motion 188-90). Later that same evening, sometime after dark, the appellants were taken to the Municipal Center where they were incarcerated for the night (Tr. 405-06). The next morning, on February 28, 1968, the appellants were placed in a show-up in the Municipal Building (Motion 166, Tr. 409). Later that morning, at approximately 10:00 A.M. the appellants were arraigned before the United States Commissioner (Motion 167, Tr. 410).

Only appellant Harris testified at the trial.

After deliberating from 3:35 P.M. on February 6, 1968 until 5:18 P.M. of the same day, the jury came in with a verdict that all three appellants were guilty of the robbery of Curtis G. Matthews and Price G. Edwards and guilty of assault with a dangerous weapon on Curtis G. Matthews and Price G. Edwards. Appellant Young was also found to be guilty of carrying a dangerous weapon (Tr. 727-30).

Appellant Harris was sentenced to three (3) to nine (9) years, said sentences to run consecutively to a sentence then being served.

Appellant Young was sentenced to three (3) to ten (10) years, said sentences to run consecutively to sentences then being served.

Appellant Johnson was sentenced to three (3) to nine (9) years. Johnson was committed for six (6) months, the remainder of the sentence being suspended, and was placed on probation for five (5) years.

STATEMENT OF POINTS

1. Appellants were illegally arrested without probable cause when their car was blockaded by at least three unmarked police cars and was forced to stop as a result thereof, and the appellants' car was thereafter surrounded by at least five police officers, only one of which was in uniform.

2. Appellants were subjected to an unreasonable search and seizure when, after having done no more than look into a bank and make a U-turn (neither of which was alleged to be an illegal act), their car was forcibly stopped by unmarked police cars and thereafter their car was searched without a warrant.

3. Appellants were subjected to an illegal search when Officer Kerick entered appellants car without a search warrant or the consent of appellants, and before making a legal arrest or having probable cause to do so.

4. Appellants were denied due process of law because the line-up in which Curtis G. Matthews identified appellants was unnecessarily suggestive and conducive to mistaken identification.

5. Appellants were subjected to a line-up during a period of unnecessary delay in violation of Rule 5a of the Federal Rules of Criminal Procedure, and this evidence should have been suppressed.

6. The in-court identifications of appellants by Mr. Matthews should not have been admitted into evidence since his identifications were the fruit of an illegal search and seizure and the fruit of an illegal line-up.

SUMMARY OF ARGUMENT

ARGUMENT I

A. Appellants were arrested at the time when their car was blockaded by at least three police cars and surrounded by five or more police officers. Appellants could neither drive nor walk away from the scene. Their liberty was restrained and they submitted in consequence. At this time there was no probable cause to arrest, and therefore, the arrest was illegal.

B. Even if appellants were not formally arrested, they were illegally searched and seized. Considering that appellants had merely looked in the direction of a bank for approximately five minutes after which they drove away by making a legal U-turn, the seizure of appellants with unmarked personal cars and police in old work clothes was unreasonable. This is particularly so in view of the subterfuge which was used to make the forcible stop, i. e., a check of driver's license and registration. The police were not in good faith interested in the driver's license and registration, but instead stopped appellants so they could make a search of the car without a warrant. Whether the police entered the car before or after seeing what appeared to be a shotgun, the search and the seizure were unreasonable under all the circumstances.

C. If the Court holds that there was no arrest at the time the car was stopped and that the search and seizure were not unreasonable, appellants were searched without a warrant, without consent, without a

legal arrest, and without probable cause for an arrest when Officer Kerick entered appellants' car. At that time Officer Kerick at most, had only seen something which "appeared" to be the barrel of a shotgun. He did not have probable cause for arrest and had not made a legal arrest. Therefore, the search was illegal, not being incident to a lawful arrest.

ARGUMENT II

The line-up at which Mr. Matthews identified appellants was unfiar and violated due process. The two non-suspects in the line-up police officers wearing coats and ties; whereas appellants were dressed in casual clothes. Furthermore, Mr. Matthews was told prior to the line-up that the suspects had been found with a shotgun. Still worse, the shotgun was in plain view in the same room as the line-up. The line-up was unnecessarily suggestive and conducive to mistaken identification. Testimony concerning the line-up should not have been admitted at the trial.

ARGUMENT III

Appellants were arrested and charged with violation of the Federal Firearms Act. They should have been arraigned on that charge without unnecessary delay. Instead, they were submitted to a series of five or six line-ups unrelated to the Federal Firearms Act violation. At one of these line-ups, Mr. Matthews identified appellants as his assailants. Since the line-up occurred during a period of illegal detention and since there was no probable cause to arrest appellants for the robbery of Matthews Drug Store until after the line-up, testimony concerning the line-up should not have been admitted at the trial.

ARGUMENT IV

It was error to permit Mr. Matthews to make an in court identification of appellants. The identification was the direct fruit of the illegal search and seizure of appellants and the illegal line-up. The government has made no showing that the evidence stemmed from an independent source. The burden is on the government to do so. The in court identifications should not have been admitted by the Court.

ARGUMENT I

APPELLANTS' CONSTITUTIONAL RIGHTS UNDER THE FOURTH AMENDMENT WERE VIOLATED AND EVIDENCE OBTAINED AS A RESULT THEREOF SHOULD HAVE BEEN SUPPRESSED

A. Appellants Were Illegally Arrested Without Probable Cause

The police had decided "to set up more or less of a roadblock to stop the [appellants'] car".[2] Appellants had just passed through the intersection at Third and K Streets, N.E., proceeding northward in their automobile when Officer Ellis's car ahead of them came to an abrupt stop, forcing appellants to stop. At the same time, the automobile behind appellants carrying Officers Rattay and Kerick, immediately pulled up to within a few feet of the rear of appellants' car.[3] Within moments, two other cars with two policemen each pulled up alongside appellants' car, thus blocking the other lane of traffic, and the only other possible route of departure from the scene. The four police cars, all of which were unmarked, had a total of at least seven police officers in them, who immediately got out of their automobiles and "surrounded" appellants' car.[4]

2/ Motion 112, 138.
3/ Motion 32, 57.
4/ Motion 38, 65, 77-79, 95, 138.

At this point in time, so far as the police knew, appellants had done nothing more than peer into a bank, and make a U-turn, in what the police construed to be an attempt to follow the driver of a D.C. Butter and Egg Co. truck who had just left the bank. None of these actions was at any time alleged to be a violation of the law.

When appellants' car was forcibly stopped and surrounded by police officers, the appellants clearly were under arrest. Their freedom of movement had been abruptly terminated, they were physically restrained, they could not have believed they were free to leave, and they submitted in consequence.[5/]

The law of arrest is at best a murky area. In the case of Brown v. United States,[6/] this Court held that there was an arrest at the time that Brown's car was stopped and detained for minor traffic violations. Shortly thereafter, the police involved heard a "lookout" for a robbery suspect which fit Brown. Thereafter, he was arrested on that charge also, and his car was searched. Significantly, the Court held that Brown was arrested at the time he was initially stopped.

5/ Kelley v. United States, 111 U.S.App.D.C. 396, 298 F.2d 310 (1961). See also Morton v. United States, 79 U.S.App.D.C. 329, 147 F.2d 28 (1948). Long v. Ansell, 63 U.S.App.D.C. 68, 71, 69 F.2d 386, 388-89 (1934).

6/ 125 U.S.App.D.C. 43, 365 F.2d 976 (1966).

> "...There is no dispute that from the time police stopped Appellant because of the traffic violations he was not free to go, that the police intended to take him to the police station, and that Appellant felt he was being detained. This was plainly an arrest. Hunry v. United States, 361 U.S.98,103, 80 S.Ct. 168,4L.ed. 2d 134 (1959); Kelley v. United States,111 U.S.App.D.C. 396, 298 F.2d 310 (1961); Coleman v. United States, 111 U.S. App.D.C. 210,295 F.2d 555 (1961), cert.denied, 369 U.S. 813,82 S.Ct.,689,7 L.Ed. 2d 613 (1962)." 7/

Of course, the often cited Supreme Court case of Henry v. United States 8/ is pertinent to the question of when the arrest occurred. There, for tactical reasons, the government conceded that the arrest took place when the car was stopped by the narcotics officers. The Court, after noting the government's concession, stated:

> "...That is our view on the facts of this particular case. When the officers interrupted the two men and restricted their liberty of movement, the arrest, for purposes of this case, was complete...." 9/

7/ 365 F.2d at 979. However, the Court, in a footnote, was careful to point out that not every "mere detention would give rise to an arrest in all circumstances."

8/ 361 U.S. 98, 4L.Ed. 2d 134, 80 S.Ct. 168 (1959).

9/ 361 U.S. at 103.

The Henry case is very similar to a recent decision of this Court, Bailey v. United States, [10] where again the government conceded an arrest at the time the suspect car was stopped. Three police cars were used to cordon off appellants' car which fit the description of a getaway car used in a robbery occurring within the hour. After checking the driver's permit of the driver, the officer noticed a wallet on the right side of the floor of the car. A search of the wallet revealed it was the one which had been stolen.

The subjective intent of the arresting officers was not controlling on whether or not an arrest occurred, and this Court stated:

> "Though the arresting officers here did not think that a formal arrest took place until after the stolen wallet was spotted, seized and examined, the Government, as in Henry v. United States, 361 U.S.98,103, 80 S.Ct. 168, 4 L.Ed. 2d 134 (1959), concedes that in law the arrest of the car's passengers as well as its driver took place at the time Officer Stone approached the car, perhaps with gun drawn, and told appellants to sit still and keep their hands in plain sight. Even if the formal arrest was not made until after the search, the search will be upheld so long as there is probable cause for an arrest before the search is begun. See United States v. Gorman, 2 Cir., 355 F.2d 151,159-160 (1965), cert. denied, 384 U.S.1024,86 S.Ct. 1962,16 L.Ed.2d 1027 (1966). Accepting the Government's concession, the question then is whether there was probable cause for an arrest when Officer Stone first approached appellants' car. We think that there was." [11]

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[10] U.S.App.D.C. , 389 F.2d 305 (1967).

[11] 389 F.2d at 308.

In United States v. Washington, Judge Walsh held that Washington was arrested at the time that his car was flagged to a stop for a traffic violation. The Court stated:

> "...While the officer did not verbally inform the defendant that he was under arrest at this time, it is clear that defendant understood his liberty of movement was restrained. He readily submitted to the officer's restraint." 12/

In searching for the registration of the car, either Washington or the police officer opened the glove compartment from which several envelopes fell, revealing that the defendant was carrying numbers. It was only then that the officer informed defendant that he was under arrest, both for the traffic violation and for the lottery violation.

In finding an arrest at the time the car was originally stopped, the Court stated:

> "The original arrest in this case took place at the time the officer waved defendant to a halt and restricted his liberty of movement pursuant to the traffic violation. Henry v. United States, 361 U.S.98, 80 S.Ct.168, 4 L.Ed. 2d 134 (1960). This is true in spite of the officer's testimony that he did not place the defendant under arrest until after the glove compartment had been opened and the numbers slips discovered. 'Arrest' is a legal term, and the time of arrest is not necessarily that point in time when the police officer formally proclaims that the accused is being taken into custody. A man is under arrest at that point when the officer has effectively restrained the defendant, and the defendant is cognizant of that restraint. Kelley v. United States, 111 U.S.App. D.C. 396, 298 F.2d 310 (1961)." 13/ (Emphasis added)

12/ 249 F.Supp. 40, 41 (D.D.C. 1965).

13/ Id.

On appeal to this Court, Washington's conviction was affirmed, although the Court declined to "reach the question whether appellant was actually under arrest at the time the condemnatory envelopes came to light".[14/] While stating that it is commonplace to stop an observed traffic offender (which appellants here were not), the Court suggested a different result might have been reached had the police acted in other than good faith.

> "...Nothing in the record intimates that appellant's detention grew out of any other purpose, or that it was a subterfuge for a hunt for lottery material.[24]"[15/]

In contradistinction to the Washington case, everything in the case at Bar indicates that appellants' detention grew out of another purpose, not a genuine interest in the driver's license and automobile registration.

14/ _____U.S.App.D.C.____, _____F.2d____, (No.20,267 January 31, 1968).

15/ "[24]See United States v. Lefkowitz, 285 U.S.452, 467 (1932); Hutcherson v. United States, 120 U.S.App.D.C.274, 277, 345 F.2d 964 967, cert. denied 382 U.S.894 (1965); McKnight v. United States, 87 U.S.App.D.C.151, 152, 183 F.2d 977, 978 (1950); Taglavore v. United States, 291 F.2d 262, 264-66 (9th Cir.1961). Judge Walsh stated that the officer's 'inspection' of the glove compartment, see note 11, supra, 'was not conducted with an intent to uncover evidence of a crime', United States v. Washington, supra note 4, 249 F.Supp. at 42, and that '[t]here is no evidence that the traffic arrest was a mere pretext to validate a search.' Ibid. We perceive nothing in the trial testimony that is inconsistent with these conclusions." Id. at p. 9.

In numerous other cases, the courts have held that the defendants were under arrest at the time the police officers stopped and then approached the car in which the suspects were riding.[16]

It is not appellants' contention that every stopping of a car is a formal arrest. Appellants readily concede that police officers may, pursuant to bona fide routine interrogation, stop a motorist and require him to exhibit his driver's permit.[17] However, as stressed in Mincy v. District of Columbia, the routine check is permissible, "provided such check is not used as a substitute for a search for evidence of some possible crime unrelated to possession of a driver's permit."[18] As will be more fully developed in Section I, B of this brief, the police action in this case was totally unrelated to any bona fide interest in whether or not appellant Johnson was a licensed driver. Thus, the police should be denied the shield that this was merely a routine stop. This was a dangerous and deliberate attempt to make a "suspicious spot check" of appellants' car without obtaining a search warrant.

This very sort of perversion of a legitimate motor vehicle statute has been strongly condemned by the courts.[19] In Robertson v. State

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16/ Plazola v. United States, 291 F. 2d 56 (9 Cir. 1961); United States v. Davis, 265 F. Supp. 358 (W. D. Pa. 1967); United States v. Cangelose, 230 F. Supp. 544 (N. D. Iowa 1964); Murphy v. State, ____ Tenn. ____ 254 S. W. 2d 979 (S. Ct. Tenn. 1953).

17/ D. C. Code, §40-301(c) (1967 ed.).

18/ 218 A. 2d 507 (1966).

19/ 184 Tenn. 277, 198 S. W. 2d 633 (S. Ct. Tenn. 1947).

two State Highway Patrolmen became suspicious because the passenger in the automobile in front of them stared through the rear window at them. The patrolmen decided to stop the car and ask for the driver's license. One of the officers looked through the car window and saw a box labeled "Ben Franklin" whiskey. A search of the car revealed that there was illegal whiskey in the car. The Supreme Court of Tennessee held these acts constituted an unlawful arrest, stating:

> "This Court will not permit an evasion of the requirements of the law with regard to search warrants through the device, pretext, or subterfuge of a pretended examination of a driver's license.
>
> * * *
>
> "...One of the few exceptions of the law relating to arrests without a warrant is the authority of highway patrol officers to stop a car and demand to see the license of the operator.
>
> * * *
>
> "...The arrest is excusable because of revenue necessities and for the protection of the public against unqualified or dangerous operators. As stated above, this authority should be exercised in good faith and all sincerity and if exercised as a pretext or subterfuge for a search, it is an unlawful exercise of that authority and constitutes an unlawful arrest." 20/

Essentially, it is appellants' position that they were arrested at the time when their car was abruptly stopped and surrounded by at least three unmarked police cars and then converged upon by some five or more police officers. 21/ The police, except for Officer Ellis, were in plain clothes, and were using their personal (obviously unmarked) cars; 22/

20/ Id. 198 S.W.2d at 635-36.
21/ Motion 77-78.
22/ Tr. 178-80.

the police were on the lookout for felonies and were not engaged in traffic supervision;[23] Officers Kerick and Rattay wanted appellants' car stopped because they had acted suspiciously;[24] no traffic violation was charged to any of appellants;[25] in fact, the officers didn't even carry traffic tickets;[26] and importantly, Officers Kerick and Rattay at the time they stopped appellants, did not even suspect that they might have been involved in the robbery of Matthews Drug Store.[27] The appellants were stopped on the pretext of checking the driver's license and the automobile registration to justify their curiosity, and to search, if only from outside the car, the interior of the car.

The cases of Long v. Ansell and Morton v. United States,[28] held that the term arrest applied to the case where a person is "taken into custody or restrained of his full liberty, or where the detention of a person in custody is continued for even a short period of time." A similar test was applied in Kelley v. United States.[29] This rather objective test is not overly concerned with the personal reflections or feelings of either the arresting officers or the arrested persons.

23/ Johnson motion 36.
24/ Motion 54.
25/ Motion 55, 80.
26/ Motion 155.
27/ Motion 58-59.
28/ Supra, n. 5.
29/ Id.

Applying this test to the situation in which appellants found themselves, it seems quite clear that they were taken into "custody" and were restrained of their full liberty, in view of the fact that the automobile in which they were riding had been totally surrounded and blockaded by four police cars. The appellants could neither move their car, nor could they leave their car and walk off in view of the seven police officers that were present. Certainly they did not feel free to leave, and must have felt that they were in the custody of the officers present. Therefore, in both a physical and a mental sense, the appellants' locomotion or mobility had been arrested, and they themselves could logically conclude that they were under arrest.

The fact that the police did not formally proclaim appellants were under arrest when the car was stopped is not determinative of the question.[30] The real question is when were the appellants deprived of their liberty, and this clearly occurred as soon as they were stopped.

At the time appellants were stopped, there certainly was no probable cause for arrest. The police had acted to stop appellants' car merely because they had stared into a bank and made a legal U-turn in what the police construed to be an attempt to follow someone who had just left the bank.[31]

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30 / Bailey v. United States, supra, n. 10; United States v. Washington, supra, n. 12.

31 / In Plazola v. United States, 291 F. 2d 56, 60 (9 Cir. 1961), the Court held that two U-turns did not constitute sufficiently suspicious activity to provide probable cause for a narcotics arrest.

As stated in Henry v. United States,[32] /

> "Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed. Stacey v. Emery, 97 U.S. 642, 645, 24 L. Ed. 1035, 1036."

The burden of proving probable cause is on the government where the legality of an arrest without a warrant is challenged.[33] / The government here has not even begun to sustain its burden of probable cause to arrest at the time the appellants were stopped. No semblance of probable cause existed until after the shotgun was removed from the car; and that, it is urged, followed the arrest, not preceded, as required by law.

Since the arrest was not based on probable cause, the arrest was illegal and any incriminating evidence found as a result of the arrest and the subsequent search are inadmissible under the doctrine of Wong Sun v. United States.[34] /

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32 / 361 U.S. 98, 102, 4L. Ed., 2d 134, 138, 80 S. Ct. 168 (1959). See also Beck v. Ohio, 379 U.S. 89, 91, 13 L. Ed. 2d 142, 145, 85 S. Ct. 223 (1964).

33 / Rouse v. United States, 123U.S. App. D.C. 348, 359 F. 2d 1014 (1967); Wrightson v. United States, 95 U.S. App. D.C. 390, 222 F. 2d 556, 560 (1955). See also Gatlin v. United States, 117 U.S. App. D.C. 123, 326 F. 2d 666, 671 n. 10 (1963).

34 / 371 U.S. 471, 488, 9L. Ed. 2d, 441, 83 S. Ct. 407 (1963).

B. Appellants were Subjected to an Unreasonable Search and Seizure in Violation of the Fourth Amendment to The Constitution.

The Fourth Amendment to the Constitution provides in pertinent part:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, ..."

Whether or not appellants were unlawfully arrested, certainly in light of all the circumstances surrounding the stopping and searching of appellants' car appellants were subjected to an unreasonable search and seizure prohibited by the Constitution.

The police had no warrant to search the car in which the appellants were riding. Nor had the appellants committed any traffic violations up to the time their car was abruptly stopped.[35] Most importantly, at the time the appellants' car was stopped by the police, there had been no connection drawn between the appellants and the robbery of Matthews Drug Store.[36] Officer Kerick testified that there was no suspicion that appellants might have been involved in the Matthews robbery until after appellants were ordered out of their car and the shotgun had been found under the seat.[37] The fact that appellants were seated in an automobile which was parked in front of a bank, and the fact that appellants made a U-turn, which the police assumed to have been done in order to follow someone who had just driven

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35/ Motion, 55, 80.
36/ Motion, 28-29, 53-55, 58.
37/ Motion, 58.

away from the bank, certainly would not give the police probable cause to expect that a crime had been or was about to be committed by appellants.

The first event supplying probable cause occurred when Officer Kerick removed the sawed-off shotgun from underneath the driver's seat of appellants' car. However, prior to that event, the police officers had abruptly stopped the car in which appellants were riding, and had completely cut off all means of driving away by surrounding appellants' car with police cars and at least seven police officers.[38/]

The subterfuge for stopping appellants was to check the driver's license and automobile registration.[39/]

As Officer Kerick testified at the Motion to Suppress:

> "Q Well you say you've summoned other people to help you stop this car, and you told them that it was because you wanted to stop it because it was of suspicious nature?
>
> A For spot check; yes, sir.
>
> Q A spot check because of a suspicious nature, however, but not a spot check for a traffic violation; is that correct?
>
> A That is correct."

However, appellant Johnson was properly licensed and the car was registered. Not being satisfied, the Officer asked for Johnson's draft card. The following sequence is best described by Johnson's

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38/ Motion, 38, 65, 77-79, 95, 138.
39/ Motion, 54, 55.

testimony [40] as follows:

"Q What happened then, sir?

A I said okay. By this time two other officers had came from the grill.

Q What happened then?

A The officer asked me to see my driver's license and registration card. I gave it to him. Then he wanted to see my draft card. I gave him my draft card.

One fellow in the car had two draft cards, so he took him out of the car and said he was going to take him downtown to find out why he had two.

At this time, he told one of the other officers that came up later to take our name and address. So, the officer said, since we have them out here, we might as well search the car.

Q Would you tell us whether or not you were still in the car at that time?

A Yes.

Q What happened then?

A He asked us to get out of the car. We got out. He then got in and started looking under the seats and the dashboard and glove compartment, and so forth.

Q And did he find anything?

A Yes.

Q What did he find?

A He found a shotgun and a pistol.

Q Where did he find them?

A Under the seat of the car."

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[40] Johnson Motion 9-10.

The "one fellow" who had two draft cards was appellant Harris. Harris testified at the trial as follows concerning the draft cards and his removal from Johnson's car: 41/

"Q What happened next?

A After Johnson had showed this officer, who was a Sergeant -- he was in uniform -- he had uniform trousers and shirt and tie and a sweater -- and after he had showed him the driver's license and registration, then he looked at me and the rest of us in the car and asked us for our draft cards, to which we all complied.

Q Who asked you for the draft cards?

A The Sergeant.

Q The Sergeant did?

A Yes, he did.

Q How did he do it? Did he do it through the open front door window, or did he come to the back door?

A He asked through the window.

Q What did you do?

A I gave him both of mine.

Q What happened then?

A He told me to get out of the car.

Q You to get out of the car?

A Yes.

Q Did he ask anybody else to get out of the car?

41/ Tr. 379-80, 383.

A No. First he asked me why I had two.

Q What did you tell him?

A I told him that I had been re-classified and one card was a re-classification card, and he said, 'Well, you get out of the car and we are going downtown and check to see why you got so many.'

* * *

Q What happened after they got you out of the car? You were the only one of the four persons in that car that was out of the car the last time you spoke to them. What happened then?

A I got out of the car. They searched me and carried me to the blue Volkswagen, which was ahead of this car.

Q Speak up.

A After I got out of the car they searched me and took me across the front to the right-hand side of the blue Volkswagen and put me in the passenger's seat.

Q Who did this?

A This was the sergeant and another officer who assisted him."

Therefore, at least the left rear door had been opened when Harris got out of the car. The testimony concerning who opened the doors is in conflict. At the Preliminary Hearing, Officer Kerick testified as follows concerning the opening of the doors: 42/

"Q So your partner was the one who informed them why they were being arrested?

A I informed them they were being arrested for the shotgun, because I was the first one to see it, and picked it up.

42/ P.H. 17.

Q You say the -- you were standing outside the car; you looked in and saw the shotgun; then did you -- then you walked around to the driver's side and said 'I'm arresting you for this.'?

A No, ma'am. I informed them from the rear of the car that they were under arrest.

Q The windows were closed or open?

A The car doors were open.

Q The car doors were open?

A Yes, ma'am.

Q Who had opened them?

A I had opened them."

The clear implication from the verb tense used by Officer Kerick, "I had opened them," is that the doors were opened by him before he saw the shotgun.[43] However, at the trial this apparent slip was corrected.

It seems quite clear from the above that the search had begun well before any portion of the shotgun was seen by Officer Kerick. It is hypothesized that after the left rear door was opened and Harris was ordered out of the car, Officer Kerick, or some other officer, entered the car and looked under the driver's seat from the rear position, where Harris had been sitting. In any event, it seems clear that Officer Kerick opened the car doors and probably entered the car before he found the shotgun. Obviously, this was an illegal invasion of appellants' rights against unreasonable searches and seizures.

43/ Tr. 186.

The Supreme Court set forth the controlling law in the case of Carroll v. United States [44] where it stated:

> "...[T]hose lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise." (Emphasis added)

The Carroll case removed the need for a search warrant in stopping an automobile believed to be carrying contraband goods; but it still required "probable cause" before an automobile could be stopped. Thus, unless there is probable cause for arrest, appellants' automobile should have been entitled to free passage and should not have been stopped.

This, of course, does not mean that Metropolitan Police Department is without authority to stop automobiles for a routine check of a driver's license. [45] However, the right to make a routine check of driver's license is not to be used as a subterfuge for what is actually the stopping of a car to permit a search for evidence of a crime. This is exactly what the Special Operations Division policemen did in this case. The stopping of appellants' car was nothing more than a ruse to enable the officers to search for evidence which might justify their suspicions which were aroused because appellants sat in front of a bank in their car for about five minutes. [46]

44/ 267 U.S. 132, 153-54, 69 L.Ed. 543, 45 S.Ct. 280 (1924).
45/ D.C. Code, §40-301(c) (1967 ed.).
46/ Tr. 217, 546-47.

That the stopping of appellants' car was a subterfuge is patently clear from the record. None of appellants were ever charged with a traffic violation pursuant to this stopping.[47] The driver of the automobile, appellant Johnson, produced a valid driver's license and the automobile registration. Proof of the fact that the police officers had no intention of issuing a traffic ticket, is the fact that the officers who made the stop of appellants' car didn't even carry traffic tickets.[48] Instead, they were on the "lookout for crimes of a felony nature."[49]

Furthermore, the arresting officers testified on various occasions that the appellants were stopped for a "suspicious spot check"[50] in which "no offense [was] involved."[51]

Thus, appellants' "right to free passage without interruption or search"[52] was violated because the police officers' suspicion was aroused by appellants. As a substitute for obtaining a search warrant and without probable cause for arrest, the police officers abruptly stopped appellants' car in hopes that they could find probable cause. This they did, but only after[53] an unreasonable search and seizure of appellants had occurred.

47/ Motion 55, 80.
48/ Motion 155.
49/ Johnson Motion 36.
50/ Motion 53-56.
51/ Motion 80.
52/ Carroll v. United States, supra, note 44.
53/ That a "seizure" occurred which falls within the scrutiny of the Fourth Amendment is quite clear in view of Terry v. Ohio, ___ U.S. ____, 20 L. Ed. 2d 889, 88 S. Ct. ____ (1968). The Court stated: (cont'd)

In McKnight v. United States, [54] this Court has condemned the use of needless and violent invasions of private property where the real purpose of the invasion was not an arrest but a search. In that case, there was probable cause for arrest, but the policemen waited until McKnight entered his home so that they could also conduct a search. This Court stated:

> "The Supreme Court has specifically held that 'An arrest may not be used as a pretext to search for evidence.' United States v. Lefkowitz, 285 U.S. 452, 467, 52 S. Ct. 420, 424, 76 L. Ed. 877, 82 A.L.R. 775."

The police actions in the case at Bar are more offensive than those in the McKnight case since here there was not even any semblance of probable cause to arrest.

In Mincy v. District of Columbia, [55] the "routine spot check" of a

53/ (cont'd)

> "In our view the sounder course is to recognize that the Fourth Amendment governs all intrusions by agents of the public upon personal security, and to make the scope of the particular intrusion, in light of all the exigencies of the case, a central element in the analysis of reasonableness." 20 L. Ed. 2d at 904, n. 15.

The Court also stated:

> "We therefore reject the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a 'technical arrest' or a 'full-blown search.'" 20 L. Ed. 2d at 904.

54/ 87 U.S. App. D.C. 151, 183 F. 2d 977, 978 (1950).
55/ 218 A. 2d 507 (1966).

driver's permit was sanctioned "provided it is not used as a substitute for a search for evidence of some possible crime unrelated to possession of a driver's permit." In the instant case, Officer Kerick testified that this was not a "routine check"[56/] thereby taking away the protective cover of the D.C. Code provision, Section 40-301(c).

The states have been quick to denounce police use of a legitimate statute authorizing them to check for a driver's license to conduct a search of a car for evidence of a crime even where the search is made from outside the car.

The decision in Cox v. State,[57/] is exemplary of several cases decided by the Supreme Court of Tennessee. In this case, the Highway Patrolmen thought that the defendant had been selling whiskey in violation of the law. They followed defendant in his automobile until he crossed into another county where the possession and transportation of whiskey was unlawful at which time they told the defendant to stop his car. As they asked for defendant's driver's license, they visually inspected the interior of the car. One Patrolman saw what appeared to be the neck of a whiskey bottle extending from a sack next to defendant on the seat. After the whiskey was discovered, the defendant was arrested.

After stating that the State statute gave Highway Patrolmen an "unrestricted right" to demand exhibition of a license, the Court went on to say:

56/ Motion, 54.
57/ 181 Tenn. 344, 181 S.W. 2d 338 (1944).

> "There can be no doubt in this case but that in stopping the defendant's car and asking for his driver's license the Highway Patrolmen were primarily actuated by a desire to see if they could detect any evidence of intoxicating liquor being transported in the car of the defendant. This appears from the fact that they waited until the defendant had reached Sumner County before stopping him.
>
> * * *
>
> "We are unwilling to sanction this conduct. The arrest was a mere subterfuge...."58/

In his concurring opinion, Justice Neil stated:

> "While I fully agree with the contention of the able Assistant Attorney General that a State Highway Patrolman may at any time stop the driver of an automobile for the purpose of examining his driver's license, I am constrained to hold that he cannot do so as a mere pretense in order to search the automobile for whiskey or any other contraband article.
>
> * * *
>
> "...In order for a search to be lawful, when the Patrolman stops a car to examine a driver's license, it should be made to appear that the examination is made in good faith and not as a mere blind or an excuse for a failure to procure a valid search warrant."59/ (Emphasis added)

This case is particularly noteworthy since there is no indication that the police officers did any more than visually inspect the interior of the automobile from the outside. Even this was found to be an illegal search, where the stopping of defendant's automobile was not made in good faith.

The same conclusion was reached by the Supreme Court of Florida, sitting en banc, in Byrd v. State,60/ where the Court held that the

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58/ Id., 181 S.W.2d at 340.
59/ Id.
60/ 80 S.2d 694 (1955).

stopping and searching of defendant's truck was unconstitutional. In this case, the sheriff had received information that Byrd's truck was loaded with "moonshine" whiskey. The sheriff followed appellant's truck which was proceeding at a lawful speed and observing all the rules of the road. The sheriff testified that he stopped the automobile and checked appellant's driver's license "because [he] was informed it was loaded with 'moonshine' whiskey." Thereafter, the sheriff and others walked around the truck using a flashlight and automobile lights, and discovered dripping from a side door a substance which they then and there purported to identify as "moonshine" whiskey. Thereafter Byrd was arrested and handcuffed and the truck was thoroughly searched against Byrd's desire. The trial court found that the sheriff had a right to stop the truck for the purpose of ascertaining whether or not the driver was duly licensed. The Supreme Court reversed, stating:

> "...This is true, but it is not the case before us, since the sheriff did not stop the truck to check appellant's license, but 'because (he) was informed it was loaded with moonshine whiskey.' And the sheriff himself referred to the information on the basis of which he acted as a 'tip'.
>
> "We have repeatedly held that a minor traffic violation cannot be used as a pretext to stop a vehicle and search it for evidence of violation of other laws. [citations] And courts adjudicating the question have also applied this rule to cases wherein the privilege of stopping vehicles to check licenses or conduct an inspection for minor defects in equipment was similarly abused. [citations] Since the sheriff

> could not have used the checking of appellant's license as a pretext to stop and search his vehicle, and since the avowed purpose of the sheriff in stopping the vehicle had no connection with appellant's license in any event, the trial court's reasoning upon this issue must necessarily fail." 61 /

The Court then considered the question of the whiskey which was dripping from the truck in plain view and concluded that even an expert was probably not able to detect by taste and smell the difference between liquors on which tax had been paid and liquors on which tax had not been paid. Therefore, they were unwilling to find probable cause for arrest as a result of the liquor which was dripping from the truck.

Similarly, in the case at Bar, Officer Kerick was only able to testify that the metal which he saw protruding from underneath the front seat "appeared" to be the barrel of a shotgun, but it could have been a pipe.

At the hearing on appellants' Motion to Suppress, Officer Kerick testified as follows:

> "Q It also looked like a piece of pipe, too, didn't it?
>
> A It could.
>
> Q In other words, it just as easily could have been a piece of pipe as it could have been a shotgun?
>
> A I [sic] could have, I suppose." 62 /

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61 /Id. 80 S. 2d at 696.
62 / Motion 41.

Furthermore, it was impossible for Officer Kerick, with any degree of certainty, to determine whether the three or four inches of metal tubing which he thought he saw was part of a firearm having a barrel less than 18 inches in length, i. e., the length under which the firearm must be registered.[63] Therefore, until Officer Kerick entered appellants' car and removed the shotgun from underneath the seat, he had no probable cause to believe that there was a violation of the Federal Firearms Act. Since the search preceded probable cause, and not the reverse, the search was clearly illegal. The "search is not to be made legal by what it turns up."[64]

Another strikingly similar case is that of People v. Lee,[65] decided by the Supreme Court of Michigan. There the appellant was stopped in his automobile for the ostensible reason that his license plate was bent so as to be unreadable. The officer, after checking appellant's driver's license, entered the appellant's automobile in order to check his brakes. In doing so, he lifted a cushion which was on the driver's seat and observed marijuana cigarettes lying thereunder. On cross-examination, it was revealed that the Officer was assigned to gambling and vice and customarily only made stops of vehicles for moving violations. Furthermore, the Officer did not give the appellant a ticket for the violation of a bent license plate, for which he was ostensibly stopped.

63/ 26 U.S.C. §§ 5848, 5851.

64/ United States v. Di Re, 332 U.S. 581, 595, 92 L. Ed. 210, 220, 68 S. Ct. 222 (1947).

65/ 371 Mich. 563, 124 N.W. 2d 736 (1963). See also People v. Roache, 237 Mich. 215, 211 N.W. 742 (1927).

Amendment.[68]

Even if Officer Kerick saw what appeared to be a shotgun under the seat while he was outside the car and before he had opened the doors,[69] there was still an illegal seizure of appellants based on a subterfuge. The subsequent search, even under the "plain view" doctrine, was illegal and should be condemned by this Court. To sanction this type of Gestapo tactics would be to permit what many states have years ago denounced. It would reward the police's perversion of a legitimate motor vehicle statute. It would vindicate Special Operations Division police, who drive around in work clothes and personal automobiles and who forcibly stop motorists, because they have peered into a bank. The police of this city should not benefit from their wrongs, even if guilty persons must be acquitted, where the police actions are not performed in good faith.

68/ United States v. Di Re, supra n. 64; McKnight v. United States, supra, n. 54.

69/ It is suggested that the veracity of Officer Kerick's testimony should be closely scrutinized. Initially, Officer Kerick testified he "observed the shotgun in the backseat." (Motion 34.) On further questioning, the gun moved to "underneath the seat" (Motion 34). Still later, when questioned about the possibility that the "tunnel" (which lies in the middle of the floor of the car) might have obscured his vision, he testified that "the gun was laying across the top of the tunnel." (Motion 48). On further questioning, he fell back on a faulty memory, after having been so precise in his previous testimony.

Clearly, the appellants were illegally seized and searched, and their rights under the Fourth Amendment were violated. Appellants' Motion to Suppress the evidence resulting from the illegal search and seizure should have been granted. The evidence was not suppressed, but instead was used to convict appellants.

C. If The Court Finds That Appellants Were Not Arrested Until After They Were Removed From Their Car, Then Appellants' Car Was Searched Before A Legal Arrest Was Made and Before Probable Cause for Arrest Existed, Thereby Making The Search Illegal

Under Section I, A. of this brief, appellants have shown that an arrest took place at the time their car was stopped, but before the arresting officers saw what they thought was the barrel of a sawed-off shotgun protruding from underneath the driver's seat. Under Section I, B. it has further been shown that appellants were seized and searched in an unreasonable manner considering the lack of probable cause, the number of arresting officers and police cars, and the subterfuge that was used to justify the initial stop. However, if the Court does not agree with appellants' positions in Sections I, A. and I, B., appellants' car was searched before appellants were legally arrested and before probable cause existed for their arrest. In such case, the search was clearly unlawful.

In order for a search to be legal it must be preceded by a legal arrest, and not vice versa. However, this Court has held that the search may precede the formal arrest so long as there is probable cause for an arrest before the search is begun.[70/]

70/ Bailey v. United States, ____ U.S. App. D.C. ____, 389 F. 2d 305 (1967).

When the car in which appellants were riding was stopped, Officer Ellis, who was in the forwardmost car, walked back toward appellants' car and began questioning the driver, appellant Johnson, about his driver's license and automobile registration. During this time, Officer Kerick had approached from the rear of appellants' car. He testified that he looked through the right rear window of the automobile and saw three or four inches of what appeared to be a gun barrel protruding from underneath the driver's seat.[71] Officer Kerick testified that it appeared to be a gun, but it could have been a pipe.[72] Based on this, and nothing more, Officer Kerick ordered all of the appellants out of the car and proceeded to search the car to determine what it was that was extending from underneath the driver's seat.[73] Upon finding out that his suspicions were correct, Officer Kerick testified that he placed the appellants under arrest as they were standing outside the car.[74]

It is urged that based on these facts Officer Kerick did not legally arrest appellants until after he had searched their car. Furthermore, it is submitted Officer Kerick did not have probable cause for

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71/ Motion 34-36, 46.
72/ Motion 41.
73/ Motion 37, Johnson Motion 32.
74/ Johnson Motion 33-34.

arrest until after he had confirmed his suspicion that the metal object protruding from beneath the front seat was in fact an illegal firearm for which no one had a proper registration.

A very similar set of facts occurred in the case of People v. Jordan.[75] In that case, the defendant, who had been indicted for the illegal possession of a firearm, moved to suppress the use of the firearm as evidence, alleging it was the result of an illegal search and seizure. Defendant had been pulled to the side of the road by the police and asked to step out of his car. In doing so, the car door was left open. One officer using a search light looked into the interior of defendant's car.

> "The officer testified his reason for looking into defendant's car was to determine whether the defendant had some alcoholic beverage on the seat of the car, and also 'was looking into his car for anything that may be there'. One of the officers testified that he had observed the defendant moving around in a peculiar manner inside the car just before the officers flagged him down. The officer thought the defendant might be intoxicated.
>
> While the officer was looking into the defendant's car, he observed on the front seat a square cushion, and from underneath such cushion, an object, to the extent of two inches, was protruding. As to the description of the said object, the officer testified as follows: 'I observed two inches, roughly, of a butt of some kind of gun or pistol. It appeared to be a revolver * * *. I observed what appeared to be a revolver handle sticking out'. Upon making the observation, the officer reached into the car, picked up the weapon from underneath the cushion, and

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75/ 37 Misc. 2d 33 (Orleans County Ct., N.Y. 1963).

removed the weapon from the car. The defendant was asked if he had a valid permit for the gun, and when he answered in the negative, he was placed under arrest. The officer retained the gun." (Emphasis added)

The Court went on to reason that a search is reasonable if conducted pursuant to a legal search warrant, by consent, or incidental to a lawful arrest; and that a search of an automobile without a warrant cannot be made on mere suspicion. The Court stated:

". . . This is not a case involving a contraband article that was in 'open' and 'plain' view. It is not a search to observe that which is open and patent in either sunlight or artificial light. (Smith v. United States, 2 F. 2d 715.) The object was hidden under the cushion except for about two inches of it. The officer testified he observed 'what appeared to be a revolver.' The officer was not sure from his observation of the two inches of the object which protruded from underneath the cushion that such object in its entirety was a revolver. The officer could only say that 'it appeared to him to be a revolver.' Before certainty could be established, it was necessary to reach under the cushion and withdraw the object.

It did not constitute a search for the officer to stand by the defendant's car and look into it while the defendant's car was illuminated by the headlights and searchlight of the officers' car (Boyd v. United States, 286 F. 930). However, the officer did more than look. He reached into the defendant's car and withdrew the object from underneath the cushion, and it was the result of that action which resulted in the identification of such object as a revolver. By his action, the officer brought to light something which had been hidden from view by the action of the defendant. 'A search implies a prying into hidden places for that which is concealed and that the object searched for has been hidden or intentionally put out of the way.' (People v. West, 144 Cal. App. 2d 214, 219)

> The taking of the gun from underneath the cushion in the manner and under the circumstances described above, constituted a search by the officer. The arrest of the defendant was not made until after the search. Since this search was not conducted pursuant to a valid search warrant, nor incidental to legal arrest, nor by the consent of the defendant, it was an illegal search. The gun is not admissible as evidence against the defendant upon his trial on the charge of illegal possession of a firearm (Mapp v. Ohio, 367 U.S. 643)...."

The Court apparently reasoned that merely seeing two inches of what "appeared" to be a revolver protruding from under the pillow did not constitute probable cause for arrest, but merely gave rise to a suspicion. This same reasoning is applicable to the facts in the case at hand, where the officer testified that he could see only three or four inches of what "appeared" to be the barrel of a shotgun, (but it could have been a pipe).[76/] At that point Officer Kerick merely had a suspicion that there might be a weapon underneath the front seat, but by no means had probable cause to arrest appellants. It could have been a pipe; it could have been a shotgun requiring no registration; or it could have been a validly registered shotgun. None of these situations would have constituted a violation of the law. Without seeking more information and without knowing whether it was a pipe or a validly transported shotgun, Officer Kerick ordered appellants out of the car, recovered the shotgun, and then notified appellants they were under arrest.[77/]

76/ Motion 41.
77/ Johnson Motion 33-34.

It is clear that appellants' car was searched without consent, without a warrant, and not pursuant to a legal arrest; nor was there probable cause for arrest.

As stated in Henry v. United States, 80 S. Ct. 168, 172;

> "The fact that the suspects were in an automobile is not enough. Carroll v. United States, supra, liberalized the rule governing searches when a moving vehicle is involved but that decision merely relaxed the requirements for a warrant on grounds of practicality. It did not dispense with a need for probable cause."

Therefore, the evidence resulting from the illegal search of appellants' car should have been suppressed at the trial.

ARGUMENT II

APPELLANTS WERE DENIED DUE PROCESS OF LAW AS A RESULT OF AN UNFAIR LINE-UP AND THIS EVIDENCE SHOULD HAVE BEEN SUPPRESSED

After appellants were arrested at approximately 12:50 P.M. on February 27, 1967, they were taken to the Ninth Precinct for a series of line-ups.[78] Mr. Curtis G. Matthews, who had been robbed that morning, was taken to the Ninth Precinct to view appellants. Mr. Matthews identified each of the appellants, and evidence concerning the identification was admitted at the trial.[79]

It is urged that the line-up viewed by Mr. Matthews "was so unnecessarily suggestive and conducive to irreparable mistaken identification that [appellants were] denied due process of law" under Stovall v. Denno.[80]

The three appellants and the fourth occupant of appellants' car, Bell, were placed in a line-up with two police officers. Both of the police officers had on coats and ties with dress shirts; whereas, appellants were dressed in sport clothes. (A photograph of the line-up appears in the record as Defendant Young's Exhibit 1, introduced for identification at Tr. 110).

78/ Motion 146.
79/ Tr. 76-77.
80/ 388 U.S. 293, 301-02, 18 L.Ed. 1199, 1206, 87 S.Ct. 1967 (1967).

The difference in appearance of the officers was so striking that they may as well not have been in the line-up at all.

As Robert M. Little [81] testified at the trial:

"Q And you said in your direct testimony that one of them looked like an officer?

A That's right.

Q Didn't you in fact pick that man out of the lineup as one of the people you had seen and found out later he was a police officer.

A No, no, sir.

Q No, sir?

A No, sir.

Q You spotted him as a police officer when you first went in there?

A That's right, sir. When I first went in." [82] (Emphasis added).

While Mr. Little did not immediately recognize the second policeman, Mr. Matthews may have.

As a further indication of the unfair manner in which the line-ups were conducted is the fact that Mr. Little was told by Mr. Matthews before he ever viewed the line-up that "these were the boys." [83]

81/ Mr. Little was nearby when the robbery of Matthews Drug Store occurred. He saw three men running away from the drugstore, and was brought to the Ninth Precinct with Mr. Matthews to view a line-up including appellants. He was called as a witness at the trial for appellant Harris.

82/ Tr. 474-75.

83/ Tr. 474, 487.

While Mr. Little was not called as a witness for the government, this incident casts one more shadow on the entire line-up process conducted that day.

Mr. Matthews, who did testify for the government concerning the line-up,[84] was predisposed to identify appellants before he ever saw them. On the way to the Ninth Precinct prior to the line-up, Mr. Matthews, who had just that morning stared into the barrel of a loaded shotgun, was told by Detective Ralls that the suspects he would view "had a shotgun".[85]

Furthermore, Mr. Matthews testified as follows concerning seeing the weapons at the time of the line-up:

> "Q All right, did they show you any weapons? Particularly I show you now Defense Exhibit No. 1, for identification, a shotgun. Did they show you that before you went in?
>
> A I saw that when I went in.
>
> Q When you went in. All right, and did you see the pistol at the same time?
>
> A Yes.
>
> Q And that was before or simultaneous with the time that you observed the lineup?
>
> A I saw the pistol after I observed the lineup.
>
> Q All right, and you saw the shotgun before you saw the lineup or about the same time?

84/ Tr. 76-77.
85/ Motion 201.

A The shotgun was in the room where I observed the lineup." 86/

In other words, Mr. Matthews was viewing the shotgun at the same time he was viewing appellants. Apparently, the pistol was seen immediately after the line-up.

Another element of basic unfairness in the line-up relates solely to appellant Harris. In the line-up Harris was forced to wear a dark topcoat belonging to Bell (the fourth occupant of the car) which was too large for him and which resembled a coat worn by the assailant carrying the shotgun.

Mr. Matthews placed great emphasis on the fact that the assailant with the shotgun wore a coat that was "unusually large. It appeared to be oversized." 87/ On cross-examination, Mr. Matthews repeated his recollection of the coat being "unusually long." 88/

When appellants' car was stopped, Harris testified that he and Bell both had their coats off, lying on the seat. 89/ However, when the photographs were taken and the line-ups held at the Ninth Precinct, one of the Officers made Harris put on Bell's long gray overcoat, and Bell wore Harris's. 90/

86/ Motion 202-03.
87/ Tr. 73.
88/ Tr. 99. See also Tr. 160.
89/ Tr. 377-78, 422, 23.
90/ Tr. 391-92, 401-04, 432-34, 438-39.

The coat must have made quite an impression on those who saw it. Mr. Little (who had seen three persons running down the street after the robbery) testified that:

> "Q I see. Now will you speak slowly and distinctly so we can all understand you? And will you tell us what happened after you got over to the precinct?
>
> A Well they put six in the lineup and so they told me to come in and see if I knew any of them. And I went down and looked and two of them, the short one and the other one, and the tall one I couldn't recognize him. And I had been knowing him only by the gray coat. "91 / (Emphasis added)

Later, Mr. Little again referred to the "one in the dark coat." 92 /

Apparently, Officer Kerick's eye was caught by Bell's coat. He testified:

> "Q Do you recall now how Lawrence Bell was dressed at the time that you stopped the vehicle?
>
> A The only thing outstanding I remember at this time is the coat." 93/

But instead of permitting Harris to wear his own coat, he was told to wear Bell's coat, making him fit the description of the assailant wearing the dark, over-sized coat which had stuck in Mr. Matthews' mind.

In Stovall v. Denno, 94 / the Supreme Court stated that line-ups which are "unnecessarily suggestive and conducive to irreparable mistaken identification" violate due process of law.

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91 / Tr. 464.
92 / Tr. 469. See also Tr. 475-76.
93 / Tr. 237.
94 / Supra, n. 80.

In United States v. Wade,[95] the Court pointed out many of the prejudicial procedures commonly used in line-ups which create "suggestive influences" on the viewer. As examples, the Court gave:

> "...[t]hat all in the lineup but the suspect were known to the identifying witness, that the other participants in a lineup were grossly dissimilar in appearance to the suspect, that only the suspect was required to wear distinctive clothing which the culprit allegedly wore, that the witness is told by the police that they have caught the culprit after which the defendant is brought before the witness alone or is viewed in jail, that the suspect is pointed out before or during a lineup, and that the participants in the lineup are asked to try on an article of clothing which fits only the suspect."

It is urged that the coats and ties worn by the police in the line-up gave them a "grossly dissimilar" appearance to the four suspects, three of which are appellants here. As Mr. Little testified,[96] he realized one was a policeman as soon as he saw him.

The most suggestive aspect, however, relates to the shotgun. Not only was Mr. Matthews told that the people he would view had been found carrying a shotgun, but he saw the shotgun in the room where the line-up was held. In Wright v. United States, this Court added to the list of unfair practices enumerated in Wade, "the fact that minutes before the confrontation the identifying witness had recognized the automobile which the culprits had employed in their criminality."[97] If an automobile

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95/ 388 U.S. 218, 233, 18 L. Ed. 2d 1149, 1160-61, 87 S. Ct., 1926 (1967).
96/ Tr. 474-75.
97/ ___U.S.App. D.C.___, ___F.2d___ (No. 20,153 Jan. 31, 1968).

can be suggestive, how much more suggestive a sawed-off shotgun, particularly to a hold-up victim who had looked into a shotgun barrel a few hours previously. Furthermore, Mr. Matthews saw appellants' pistol when he came out of the line-up.

In Palmer v. Peyton, [98] the complaining witness prior to her identification was shown the orange-colored shirt which Palmer was wearing and which was "about the same color" as that worn by her attacker. This was an important factor, relied on by the Court, in holding the identification failed to meet "those canons of decency and fairness established as part of the fundamental law of the land." [99] Again, could a shirt be more suggestive than a sawed-off shotgun?

As to Harris, Bell's oversized dark topcoat which he was forced to wear would certainly constitute "distinctive clothing" condemned in Wade. There was no explanation given as to why Harris was forced to wear a coat which obviously did not fit him. The clear implication is that of an overzealous police force.

It is urged that the above elements of basic unfairness coupled with the overall slipshod procedure which would permit one identifying witness to say to another before the latter had seen the line-up "these were the boys", [100] constitute the unnecessarily suggestive and conducive practices forbidden in Stovall. Appellants were denied due process of law

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98/ 359 F. 2d 199 (4 Cir. 1966). See also Crume v. Beto, 383 F. 2d 36, 39 (5 Cir. 1967).

99/ Id. at 202.

100/ Tr. 474-75.

In United States v. Wade,[95] the Court pointed out many of the prejudicial procedures commonly used in line-ups which create "suggestive influences" on the viewer. As examples, the Court gave:

> "...[t]hat all in the lineup but the suspect were known to the identifying witness, that the other participants in a lineup were grossly dissimilar in appearance to the suspect, that only the suspect was required to wear distinctive clothing which the culprit allegedly wore, that the witness is told by the police that they have caught the culprit after which the defendant is brought before the witness alone or is viewed in jail, that the suspect is pointed out before or during a lineup, and that the participants in the lineup are asked to try on an article of clothing which fits only the suspect."

It is urged that the coats and ties worn by the police in the line-up gave them a "grossly dissimilar" appearance to the four suspects, three of which are appellants here. As Mr. Little testified,[96] he realized one was a policeman as soon as he saw him.

The most suggestive aspect, however, relates to the shotgun. Not only was Mr. Matthews told that the people he would view had been found carrying a shotgun, but he saw the shotgun in the room where the line-up was held. In Wright v. United States, this Court added to the list of unfair practices enumerated in Wade, "the fact that minutes before the confrontation the identifying witness had recognized the automobile which the culprits had employed in their criminality."[97] If an automobile

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95/ 388 U.S. 218, 233, 18 L. Ed. 2d 1149, 1160-61, 87 S. Ct., 1926 (1967).
96/ Tr. 474-75.
97/ ___U.S.App.D.C.___, ___F.2d___ (No. 20,153 Jan. 31, 1968).

can be suggestive, how much more suggestive a sawed-off shotgun, particularly to a hold-up victim who had looked into a shotgun barrel a few hours previously. Furthermore, Mr. Matthews saw appellants' pistol when he came out of the line-up.

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98/ 359 F. 2d 199 (4 Cir. 1966). See also Crume v. Beto, 383 F. 2d 36, 39 (5 Cir. 1967).

99/ Id. at 202.

100/ Tr. 474-75.

when Mr. Matthews was permitted to testify at the trial concerning the line-up identifications of appellants.[101] This evidence should have been suppressed.

101/ Tr. 76-77.

ARGUMENT III

APPELLANTS WERE SUBJECTED TO AN UNNECESSARY DELAY BEFORE ARRAIGNMENT IN VIOLATION OF RULE 5(a) FED. R. CRIM. P. AND EVIDENCE OBTAINED DURING THE DELAY SHOULD HAVE BEEN SUPPRESSED

Before trial, appellants moved to suppress all evidence relating to the line-ups, on the basis that it was obtained during a period of unnecessary delay before presentment of appellants to a Commissioner in violation of Rule 5(a) of the Federal Rules of Criminal Procedure.[102/] Appellants' Motion to Suppress was denied. Appellants renewed their motion at the trial and it was again denied.[103/] Mr. Curtis G. Matthews testified as the government's witness at the trial concerning the line-up which was held subsequent to appellants' arrest.[104/]

Appellants were arrested on February 27, 1967, at approximately 12:50 in the afternoon. Appellants were arrested for violation of the Federal Firearms Act based on the sawed-off shotgun which was found under the driver's seat of the automobile in which appellants were riding, since none of appellants could produce a registration for the firearm.[105/]

At this point, the police undoubtedly had probable cause for arrest.[106/] Since further investigation was necessary to justify the arrest, appellants

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102/ Motion, 8-13.
103/ Tr. 48.
104/ Tr. 76-77.
105/ P. H. 13-14.
106/ The count in the indictment based on the Federal Firearms Act was dropped at the trial because the Act in the meantime had been held to be violative of the privilege against self-incrimination. Hayes v. United States, _____U.S._____, 19 L. Ed. 2d 923 (1968).

should have been promptly booked and arraigned on this charge.[107]

Instead of promptly booking and arraigning appellants, the appellants were taken to the Ninth Precinct at about 1:00 P.M. and subjected to a series of line-ups on the possibility that appellants may have been involved in one of numerous recent robberies. The police called in victims of various holdups.[108] As a result of one of these line-ups, appellants were identified by Mr. Curtis G. Matthews as having been the persons who had robbed him earlier that day. It was not until the following day, February 28, 1967, that appellants were additionally charged with the crimes involved in this appeal.

The record shows all too clearly that the arraignment of appellants was intentionally delayed in order that the police could investigate other crimes for which there was no probable cause to arrest appellants. At approximately 3:00 o'clock in the afternoon, Detective Blancato telephoned the Commissioner concerning the arraignment of appellants.[109] At the hearing on Appellants' Motion to Suppress, Detective Blancato testified as follows on cross-examination:

> "Q. Now you do not know whether the United States Commissioner was available 1:00, 2:00 or 3:00?
>
> A. Well, I imagine he was because I talked to him at three o'clock. He was available.

107/ There is conflicting testimony as to whether or not appellants were warned at the time of their arrest of their Constitutional rights. (Johnson Motion, 34, Motion, 257, Tr. 387).

108/ Motion 175, Tr. 402

109/ Motion 188-90

Q. The Commissioner was there?

A. He was there.

Q. And was any request made by you of the United States Commissioner to make himself available for purposes of arraigning four defendants?

A. I talked to the Commissioner at three o'clock?

Q. And?

A. And I told him we were going to be tied up awhile longer, possibly another hour and a half or two hours longer, and he told us to bring them in the morning." (Emphasis added)

The above clearly shows that the Commissioner was available, but appellants were not taken before him because the police still had another 1-1/2 to 2 hours of investigation which they wished to conduct before arraignment. In fact, appellants were kept at the Ninth Precinct until at least 5:00 P.M., or four hours after their arrival, for the purpose of line-ups.[110/]

After being incarcerated that night at the Municipal Building appellants were taken the following morning to a "show-up" in the Squad Room at the Detective Bureau where they were viewed by various police officers.[111/] Finally, at approximately 10:00 A.M. on the following day, over 21 hours after arrest, the appellants were brought before the United States Commissioner, Sam Wertleb, to be apprised

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110/ Motion 167.

111/ Motion 166, 179. Tr. 409

of their rights.[112] During this 21 hour interval of unnecessary delay, the police succeeded in gleaning enough information to charge appellants with the crimes presently at issue, and they were so charged at the arraignment.

It is strongly urged that appellants should have been arraigned without unnecessary delay after they had been arrested for violation of the Federal Firearms Act, Mallory v. United States.[113]

This Court has recently decided in Adams v. United States [114] that line-up identifications attempting to connect defendant with crimes other than the one for which he was arrested, may be suppressed where they occur during a period of illegal detention under Rule 5(a).

The facts in that case are strikingly similar to the instant situation. Appellants there were arrested at 1:40 P.M. They were placed in line-ups from about 2:00 P.M. until about 8:00 or 9:00 P.M. The following morning between 8:30 and 10:00 A.M. additional line-ups were held, in one of which they were identified for the robbery on which the appeal was taken. This was not the same robbery for which appellants were originally arrested.

112/ Motion 167.

113/ 354 U.S. 449, 1 L. Ed. 2d 1479, 77 S. Ct., 1356, (1957); Rule 5(a) Fed. R. Crim. P.

114/ ___ U.S. App. D. C. ____, ____ F. 2d ____ (No. 20,547 June 21, 1968).

Similarly, in the case at Bar, appellants were arrested for a Federal Firearms Act violation bearing no connection to the robbery here on appeal. Appellants were placed in line-ups at the Ninth Precinct probably until around 3:00 P.M., and were placed in a "show-up" the following morning. The line-up identification by Mr. Matthews occurred sometime after 2:00 P.M. [115/] While this was not the following morning, as in Adams, it still occurred during an "unnecessary" delay.

The theory of permitting at least one line-up on the charge for which a suspect is arrested has largely been justified on the ground that he may be exonerated. [116/] Therefore, the ends of justice are met by such a delay. But here, the appellants were clearly in violation of the Federal Firearms Act, and no amount of line-ups would ever exonerate them. Still they were unnecessarily detained in hopes of finding their involvement in other crimes unrelated to their arrest and for which there was no probable cause for arrest. As stated by this Court in Adams:

> "Here, the lawful basis for appellants' arrest and detention rested solely on the probable cause for the belief that they had committed an attempted robbery on November 5 at the North Carolina Avenue store. There was no probable cause to detain them under arrest for other matters. Rule 5(a) provides that presentment without unnecessary delay shall be made

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115/ Motion 236

116/ See Payne v. United States, 111 U.S.App.D.C. 94, 294 F. 2d 723, 727 (1961), cert.denied, 368 U.S. 883, 7 L. Ed. 2d 83, 82 S. Ct. 131 (1961).

> on the charge for which they were arrested. To continue their custody without presentment for the purpose of trying to connect them with other crimes is to hold in custody for investigation only, and that is illegal; its operative effect is essentially the same as a new arrest and, if not supported by probable cause, it is an illegal detention.
>
> * * * .
>
> "What we lack power to do is to give absolution in respect of what became, by reason of the Rule 5(a) violation, a purely investigatory detention and hence, as we have noted, one tantamount to an illegal arrest the fruits of which may not be used under Bynum."

This Court has expressed its strong disapproval of holding multiple line-ups during the time when the suspect should be arraigned and formally apprised of his rights.[117/]

In Gatlin v. United States,[118/] this Court again criticized the unnecessary delay and detention of a suspect until a series of line-ups were completed. The Court stated:

> "We thought we had made it clear in Payne that 'we do not condone lengthy detention for the purpose of rounding up complaining witnesses so that they may view a suspect.' Payne v. United States, 111 U.S.App.D.C. 94, 98, 294 F.2d 723, 727, cert denied, 368 U.S. 883, 82 S.Ct. 131, 7 L.Ed.2d 83 (1961).
>
> And as Judge Youngdahl held in United States v. Meachum, D.D.C., 197 F.Supp. 803, 805 (1961):

117/ Id. See also Ricks v. United States, 118 U.S.App.D.C. 216, 334 F.2d 964, 968 (1964).

118/ 117 U.S.App.D.C. 123, 326 F.2d 666, 671 (1963).

> '* * * Desire to hold a series of lineups on charges similar to one for which probable cause may once have appeared is not such continuing probable cause as will justify retention in custody when the original cause is dissipated.
>
> * * * * * * *
>
> 'Without deciding whether it was proper, under [Rule 5(a)], for a lineup to be held on the [original] charge, it was decidedly improper for preliminary proceedings on that charge to be delayed for a lineup and questioning about another charge * * *.' "

The actual line-up in which Mr. Matthews identified appellants occurred some time after 2:00 P.M. and before 3:00 P.M. However, the exact amount of time is not nearly so important as the purpose for the delay. With respect to interrogation during a delay, this Court recently stated in Naples v. United States:[119/]

> "But, so long as Mallory is the authentic Supreme Court voice on Rule 5(a), the purpose of the interrogation, whether it be long or short, can never be anything but critical. That purpose is—and has been since Mallory—the crucial fact in measuring the reasonableness of delay in presentment after arrest."

Thus, in Naples, this Court found that a delay of somewhere between 5 and 35 minutes was too long where the purpose was to obtain enough evidence to convict.

119/ 127 U.S. App. D.C. 249 , 382 F. 2d 465, 474, (1967).

Here, the appellants were detained in order to connect them with a crime other than the one for which they were arrested, and not in any sense to exonerate them. While there was no confession involved, line-up identifications are just as damaging and are subject to suppression, as in Adams.[120/]

In conclusion, it is urged that since appellants were identified by Mr. Matthews during a period of illegal detention, this evidence should have been suppressed. Instead, it was introduced at the trial, constituting reversible error.

120/ Supra note 114.

ARGUMENT IV

THE IN-COURT IDENTIFICATIONS OF APPELLANTS WERE THE FRUIT OF AN ILLEGAL SEARCH AND SEIZURE AND ALSO STEMMED FROM AN ILLEGAL LINE-UP AND THEREFORE ARE NOT ADMISSIBLE AGAINST APPELLANTS

The illegal search and seizure of appellants led to the discovery of a sawed-off shotgun and pistol in appellants' car. It also led to the connection between appellants and a lookout which had been broadcast over the radio of officers Kerick and Rattay.[121] Certainly, but for the illegal search and seizure of appellants the connection would never have been drawn. The government violated the constitutional rights of appellants, and the fruit of that violation was the identification made by Mr. Matthews of appellants. The police did not arrive at the identification evidence through an independent source.

The case of Williams v. United States,[122] is directly in point. There Mrs. Thomas' testimony was deemed inadmissible because her identification of Williams resulted from material found in an illegal search of Williams' car. The search revealed a checkbook which linked Williams to a stolen check which had been cashed by Mrs. Thomas.

The Court held:

> "Thus, it is apparent that the identification of Williams by Mrs. Thomas was an indirect product of the illegal search and not a product of the independent activity of the postal inspectors. Wong Sun v. United States, 371 U.S.

121/ Motion 58-59.

122/ 382 F.2d 48 (5 Cir. 1967).

471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963); Silverthorne Lumber Co. v. United States 251 U.S. 385, 40 S. Ct. 182 (1920). As such, Mrs. Thomas' testimony linking Williams to the offense charged is inadmissible.

> "A lengthy discussion of the cases dealing in this area is not necessary because the significance of the nexus between an illegal search and challenged evidence is one of common sense, see Nardone v. United States, 308 U.S. 338, 60 S. Ct. 266, 84 L. Ed. 307 (1939), to be considered under the facts and circumstances of the particular case. Suffice it to say that the road from the illegal search to the testimony of Mrs. Thomas, although a little long, was not a winding one. United States v. Tane, 329 F. 2d 848 (2d Cir. 1964)." 123/

In the instant case, the route was neither long nor winding, but was short and straight. In any event, "[T]he exclusionary prohibition extends as well to the indirect as the direct products of such invasions." 124/

Certainly, the nexus between the illegal search and the in-court identification of appellants by Mr. Matthews is "one of common sense" and is the fruit of the posionous tree. 125/ The government has made absolutely

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123/ Id. at 51.

124/ Wong Sun v. United States, 371 U.S. 471, 484-85, 9 L. Ed. 2d 441, 453, 83 S. Ct. 407 (1963).

125/ See also Bynum v. United States, 104 U.S. App. D.C. 368, 262 F. 2d 465 (D.C. Cir., 1958) where this Court excluded fingerpoint evidence and Gatlin v. United States, 117 U.S. App. D.C. 123, 326 F. 2d 666 (D.C. Cir., 1963) where this Court stated: "In order to avoid another possible reversal here, it should be noted that, since the defendants were identified at a lineup after their illegal arrests and during a period of unnecessary delay, the teaching of Bynum v. United States, supra Note 12, is equally applicable to this case, notwithstanding that the Government brought this fact to the attention of the jury in two steps rather than one." 326 F. 2d at 673.

no showing of deriving the evidence from an independent source, and undoubtedly cannot do so. The burden is on the government to do so.[126] /

The in-court identification by Mr. Matthews of appellants should also be excluded since it is the fruit of the illegal line-up which was held. Mr. Matthews, under the most suggestive conditions, identified appellants as his assailants at the line-up; and at that time the faces of appellants were implanted in his mind. Lest he err at the trial, however, Mr. Matthews viewed a photograph of the line-up less than a week before the trial.[127] / Under these conditions, it can hardly be said that the in-court identifications were not the fruit of the illegal line-up.

Of course, as stated in United States v. Wade, the government should be given "the opportunity to establish by clear and convincing evidence that the in-court identifications were based upon observations of the suspect other than the lineup identification."[128] / Where there is no showing of an independent source, as here "the common sense" of Williams v. United States,[129] / should prevail.

It is strongly urged that based on the illegal search and seizure and the illegal line-up, the in-court identification of appellants by Mr. Matthews is posionous fruit and should be excluded.

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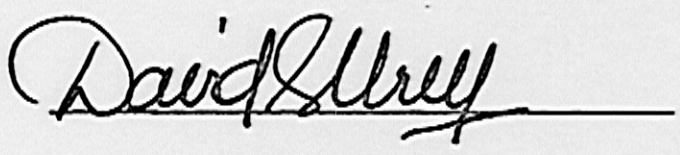
126 / United States v. Paroutian, 299 F. 2d 486 (2d Cir. 1962)
127 / Motion, 207.
128 / 388 U.S. 218, 239-40.
129 / Supra, note 122.

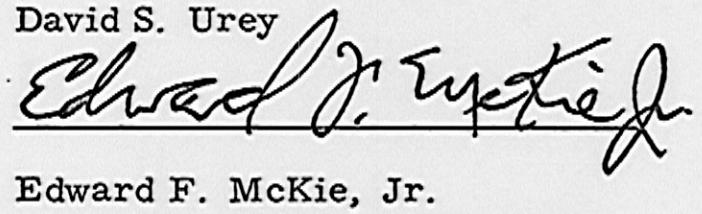
CONCLUSION

Appellants pray that this Court reverse their convictions and remand with instructions to dismiss the indictments, or in the alternative to reverse and remand for a new trial.

Respectfully submitted,



David S. Urey



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ATTORNEYS FOR APPELLANTS
(Appointed by this Court)

APPENDIX

A

STATUTES INVOLVED

Title 22, District of Columbia Code, Section 502 - Assault With Intent to Commit Mayhem or With Dangerous Weapon.

> "Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than ten years."

Title 22, District of Columbia Code, Section 2901 - Robbery.

> "Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months, nor more than fifteen years."

Title 22, District of Columbia Code, Section 3204 - Carrying Concealed Weapons.

> "No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in section 22-3215, unless the violation occurs after he has been convicted in the District of Columbia of a violation of this section or of a felony, either in the District of Columbia or in another jurisdiction, in which case he shall be sentenced to imprisonment for not more than ten years."

"APPENDIX"

B

1. The pages following the below listed trial and hearings were specifically relied upon in the Brief.

Trial

Page Nos.: 48, 53, 54, 55, 56, 57, 58, 73, 74, 75, 76, 77, 99 145, 146, 147, 148, 149, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 191, 192, 193, 194, 208, 209, 210, 217, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 377, 378, 379, 380, 383, 391, 392, 393, 401, 402, 403, 404, 405, 406, 409, 410, 422, 423, 432, 433, 434, 438, 439, 460, 463, 464, 469, 470, 474, 475, 476, 487, 546, 547, 551, 557, 558, 559, 615, 727, 728, 729, 730.

Appellants' Motion to Suppress
January 30, 31, 1968

Page Nos.: 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 26, 28, 29, 32, 34, 35, 36, 37, 38, 41, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 65, 73, 74, 76, 77, 78, 79, 80, 95, 112, 138, 146, 155, 160, 166, 167, 175, 179, 188, 189, 190, 201, 202, 203, 207, 236, 305

Johnson's Motion to Suppress
November 9, 1967

Page Nos.: 9, 10, 33, 34, 36.

Preliminary Hearing

Page Nos.: 13, 14, 17

2. Appellants are of the opinion that the following pages are pertinent to the issues involved.

Page Nos. 48-77, 98-99, 111-118, 144-150, 176-218, 338-353, 369-448, 459-489, 545-560, 610-733.